IN THE UNITED STATES DISTRICT COURT
FOR WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

UNITED STATES OF AMERICA and THE STATE OF MICHIGAN, Plaintiffs, v. NCR CORPORATION, Defendant. GEORGIA-PACIFIC LLC, GEORGIA-PACIFIC CONSUMER PRODUCTS LP, INTERNATIONAL PAPER COMPANY, and WEYERHAEUSER COMPANY, Intervenors.	Civil Action No. 1:19-cv-1041 Chief Judge Robert J. Jonker Magistrate Judge Ray Kent

UNITED STATES' REPLY MEMORANDUM IN SUPPORT OF A MOTION TO ENTER THE CONSENT DECREE WITH NCR CORPORATION

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Certification of Compliance

Pursuant to W.D. Mich. LCivR 7.2(b)(i), this brief does not exceed 4,300 words including headings, footnotes, citations, and quotations, but not including the case caption, cover sheets, any table of contents, any table of authorities, the signature block, attachments, exhibits, and affidavits, according to Microsoft Word.

This Court should enter Plaintiffs' Consent Decree with NCR Corporation ("NCR") resolving NCR's liability at the Allied Paper/Portage Creek/Kalamazoo River Superfund Site (the "Site"). The Consent Decree is fair, adequate, reasonable, and in the public interest as NCR is committing to perform substantial work, pay a significant amount of response and oversight costs, pay a significant amount towards natural resources damages, and satisfy the judgment in *Georgia-Pacific Consumer Products. LP v. NCR Corporation.*, 1:11-cv-483 (W.D. Mich.). The Decree is valued at more than $245 million, not including the almost $20 million that NCR will pay to Georgia-Pacific to satisfy the judgment. Most importantly, the Consent Decree ensures the next decade of cleanup work at the Site proceeds without delay and provides early funding for restoration projects to address natural resource damages at the Site. In fact, NCR's work under the Decree over the course of approximately the next ten years will remove almost as many cubic yards of contaminated sediment and soil as Georgia-Pacific has removed so far in its 30-year involvement at the Site. ECF No. 33 at PageID.585 (Saric Declaration).

The State of Michigan (the "State") also believes the Consent Decree is fair and adequate, and supports entry of the Consent Decree. ECF No. 12 at PageID.372. International Paper Company ("International Paper") also supports entry of the Consent Decree. ECF Nos. 12 at PageID.37 & 30 at PageID.450.

Oppositions filed by Georgia-Pacific Consumer Products LP, Georgia-Pacific LLC (collectively, "Georgia-Pacific"), and Weyerhaeuser Company ("Weyerhaeuser") largely reiterate the comments that they submitted during the public comment period. ECF Nos. 31 & 32. As such, the United States' Motion to Enter explains why entry of the Decree is reasonable, fair, adequate, and in the public interest. ECF No. 11. Georgia-Pacific, International Paper, and Weyerhaeuser (collectively, the "Intervenors") also ask that this Court not decide whether they

have a CERCLA § 107 or § 113 claim against NCR. None of these concerns should prevent entry of the Consent Decree, which will enhance cleanup of the Site and the restoration of natural resources.

I. The Proposed Consent Decree Is Fair

The Consent Decree is fair and substantially advances the cleanup and restoration of the Site, in exchange for resolving NCR's liability at the Site. The Consent Decree is consistent with CERCLA's goal of promoting settlement and finality, and the United States used reasonable cost estimates in reaching this settlement. The United States' estimates are close to Georgia Pacific's own cost estimates, and while some uncertainties exist regarding the scope and cost of the final cleanup, Georgia-Pacific overstates them in certain instances, and ignores NCR's commitment to perform substantial work with no price cap. As explained in the motion to enter, the Consent Decree is fair, reasonable, adequate, and in the public interest. ECF No. 11.

A. NCR is Significantly Contributing to the Cleanup of the River and Advancing the Next Decade of Work at the Site

NCR is performing a substantial amount of work and providing significant funding for additional work at the Site. It is hardly surprising that another responsible party wants NCR to contribute even more towards the cleanup, so that it pays less. However, Georgia-Pacific's wishes do not mean the Consent Decree is unfair. NCR's work and funding advance the cleanup and restoration of natural resources at the Site. The consent decree is also consistent with CERCLA's goal to promote settlement, finality, and efficient cleanup of the Site. *See, e.g.*, *Burlington N. & Santa Fe Ry. Co. v. United States*, 556 U.S. 599, 602 (2009) (holding CERCLA was intended to promote the timely cleanup of hazardous waste sites, ensure that polluters were held responsible for the cleanup efforts, and encourage settlement through specified contribution protection); *Detrex Corp. v. Ashland Chem.l Co.*, 01-cv-712010-DT, 2002 WL 32351496 at *7

(E.D. Mich. May 23, 2002) ("The contribution action under § 113(f)(2) was 'intended to encourage settlement while providing settling PRPs with a measure of finality in return for their willingness to settle.'" (quoting *United States v. Colorado & Easter R.R. Co.*, 50 F.3d 1530, 1537 (10th Cir. 1995)).

When this Court allocated a 40% share to NCR for past costs, it explicitly stated it was not allocating future costs. *Georgia-Pac. Consumer Prod. LP v. NCR Corp.*, 358 F. Supp. 3d 613, 632 & 645 (W.D. Mich. Mar. 2018). Even if the Consent Decree ultimately makes NCR responsible for less than 40% of future site costs, that does not mean the Decree is unfair or that NCR's share is too low. That 40% allocation was limited to certain specified costs and, by satisfying the judgment in the contribution case, NCR is paying the Court's 40% allocation. This Court has acknowledged, however, that the 40% allocation is only a "starting point" for a future allocation. The Decree takes into account litigation risk regarding NCR's liability, the efficient cleanup of the Site without the delays caused by litigation or the issuance of UAOs, certainty for NCR regarding its share at the Site, and CERCLA's goals of promoting an efficient cleanup via settlement.

Georgia-Pacific's repeated statements that it will continue working at the Site unfortunately provide no enforceable assurance that work performed by George Pacific will continue unabated. As Georgia-Pacific is well aware, parties who perform work under UAOs for years sometimes stop performing work, forcing the United States and/or the State to pursue enforcement paths, thereby slowing remediation of the site. *E.g.*, *United States v. NCR Corp.*, 688 F.3d 833 (7th Cir. 2012) (upholding preliminary injunction to enforce a UAO to clean up the Lower Fox River).

Further, this Court can also now take into account CERCLA's preference for efficient cleanup via early settlement. "[T]here is also a strong statutory preference for settlement in CERCLA cases." *United States v. Fort James Operating Co.*, 313 F. Supp. 2d 902, 908 (E.D. Wis. 2004). This is particularly true with early settlements, like this one, where "the government may find it appropriate to offer relatively favorable terms to early settlers, thereby encouraging other parties to settle based on the possibility that late settlers and non-settlers bear the risk that they might ultimately be responsible for an enhanced share of the total claim." *Id*. at 909 (citing *United States v. Charter Int'l Oil Co.*, 83 F.3d 510, 515 (1st Cir. 1996) ("[CERCLA's] statutory framework contemplates that [responsible parties] who do not join in a first-round settlement will be left with the risk of bearing a disproportionate share of liability.")); *see also United States v. Coeur D'Alenes Co.*., 767 F.3d 873, 877 (9th Cir. 2014) ("the potential for disproportionate liability is an integral and purposeful component of CERCLA"). For this reason, Georgia-Pacific's complaint that "[b]y giving NCR complete contribution protection, the Consent Decree shifts the risk of escalating costs from NCR to the non-settling PRPs" rings hollow. ECF No. 32 at PageID.492.

Georgia-Pacific's concerns regarding future costs and whether NCR paid a premium ignore the key fact that NCR is committed to performing work and, if costs increase beyond the estimate in EPA's Record of Decision, NCR bears the burden of paying such cost increases. Therefore, NCR would be performing more than that the estimated $137.5 million worth of work, if costs for the Area 2 and 3 Remedial Design/Remedial Action or the removal action in Area 4 increase.

Importantly, NCR's work under the decree is more than just dollar and cents, but work that will *in the near future* remove harmful, PCB-contaminated sediment from the Site that has

existed for decades. In fact, NCR's work under the Decree over the course of approximately the next ten years will remove almost as many cubic yards of contaminated sediment and soil as Georgia-Pacific has removed so far in its 30-year involvement at the Site. ECF No. 33 at PageID.585.

The Consent Decree is fair to the Parties and consistent with CERCLA's statutory structure and purpose. Most importantly, this Consent Decree will materially advance the cleanup and restoration of the Site.

B. EPA Updating Its Cost Estimate is Not Arbitrary and Future Costs Are Reasonably Certain

EPA appropriately updated its cost estimate and it certainly was not arbitrary to do so, as Georgia-Pacific asserts. In 2009, EPA filed a proof of claim estimating OU5 costs at $2.4 billion. During a Federal Rule of Civil Procedure 30(b)(6) deposition in 2016, EPA's designee testified that EPA had not done an updated estimate at that time. However, that testimony neither transforms the 2009 estimate into a 2016 estimate nor does it make it arbitrary for EPA to update its estimate for settlement negotiations.[1] During settlement negotiations, EPA updated its cost estimate using data that had been collected since the 2009 estimate, knowledge gained (including cost information) from removal actions that have been conducted, and remedial costs for the remedies in Areas 1 and 2 developed by Georgia-Pacific. It is prudent, not arbitrary, for EPA to use data and Site costs that are more recent, rather than rely on a 2009 estimate. As described in detail in the declaration James Saric, EPA based its updated estimate on data and cost estimates that Georgia-Pacific submitted to EPA. ECF No. 33. In fact, EPA's current

[1] It is unclear why or how Georgia-Pacific believes EPA should have withdrawn this estimate considering it was in a proof of claim.

estimate is relatively close to Georgia-Pacific's estimate (as Georgia-Pacific concedes), so Georgia-Pacific cannot claim the estimate is unreasonable.

In its opposition, Georgia-Pacific overstates the uncertainty associated with certain costs to argue NCR's share is unreasonable. First, Georgia-Pacific mischaracterizes the opt-out provision for Area 3. *See* ECF No. 2-1 at ¶ 13. That provision ensures a mutual understanding about the scope of the work in Area 3. EPA has substantial information regarding a potential remedy for Area 3, because it has conditionally approved the Remedial Investigation and Feasibility Study reports for Area 3. ECF No. 8 at PageID.257-58. Therefore, potential remedies at the Site and the potential costs associated with those remedies have been established, even if EPA has not selected the remedy for Area 3.

The purpose of the opt-out provision is to provide NCR some assurance that it is agreeing to a remedy consistent with the existing information and anticipated range of alternatives. When EPA issues the Area 3 Record of Decision ("ROD") that selects the remedy, NCR must then decide if it will agree to implement the ROD remedy or pay an opt-out figure at 150% of current estimates. The United States and the State selected the 150% opt-out figure to incentivize NCR to perform the work, instead of cashing out at the current estimate. It was not a reflection of cost uncertainties.[2] Additionally, if costs increase after issuance of the ROD, as Georgia-Pacific alleges occurred in Area 1, NCR remains committed to do the work because the opt-out applies only at the issuance of the Area 3 ROD. Providing NCR with a one-time opportunity to opt-out of work, while paying a significant premium over current cost estimates, is a fair accommodation to reflect such uncertainty.

[2] This Court should also reject Georgia-Pacific's newly raised suggestion that the United States stipulate that costs will not increase above 150% of its current projections.

Second, Georgia-Pacific overstates the certainty that Area 1 costs increased from $23.4 million to $58 million. While one hot spot is significantly larger than previously believed and would result in greater costs if the entire hotspot is excavated, EPA, Georgia-Pacific, and International Paper are currently discussing whether a portion of that hotspot can be safely capped, which, if deemed appropriate, would reduce costs from the $58 million estimate. ECF No. 33 at PageID.582. Therefore, Georgia-Pacific's references to increased Area 1 costs are overstated and misleading. Moreover, even if capping is not approved, the Area 1 estimate increased because Georgia-Pacific's contractor failed to identify the full extent of the remedial footprint in its Remedial Investigation/Feasibility Study. *Id.*

Third, while actual costs of remediation in Area 6 (including Lake Allegan) could be higher than currently estimated, Georgia-Pacific ignores the possibility that costs could be lower because less sediment removal may be needed. As explained in the attached declaration, Georgia-Pacific and EPA have been studying Area 6 to determine whether monitored natural recovery ("MNR") can be used in this Area. ECF No. 33 at PageID.584. If deemed appropriate, application of MNR would substantially reduce costs by taking advantage of the natural sedimentation of cleaner sediment on top of contaminated sediment, as well as reducing disturbance of contaminated sediment by invasive fish species. *Id.* Notably, EPA itself is providing funding to Georgia-Pacific to conduct the study regarding the fish. *Id.* While EPA will not select a remedy in Area 6 for at least another 8 years and a possibility exists that costs could increase above current estimates, Georgia-Pacific is studying ways to find the most cost-effective remedy in that Area, while ensuring the protection of human health and the environment. If MNR can be utilized at a significant scale, future site costs would be substantially reduced to the benefit of Georgia-Pacific.

While uncertainty is inherent when providing cost estimates, EPA and Georgia-Pacific generally agree on the estimated costs at the Site. It was not arbitrary for EPA to update its cost estimate, EPA's future costs estimates are reasonable, and the amount NCR is committing to is reasonable.

C. The Consent Decree is Not Inconsistent with EPA's "Matters Addressed" Memorandum

The Consent Decree is not inconsistent with EPA's memorandum regarding the scope of the "Matters Address" provision. The "Matters Addressed" Memorandum states:

> The term 'matters addressed' should be drafted on a site specific basis to correspond to the facts of the case and the intent of the parties. Generally, the term "matters addressed" should identify those response actions and costs for which the parties intend contribution protection to be provided.

ECF No. 32-3 at PageID.541. While NCR is performing work in only a portion of the Site, NCR is providing significant funding that can be used anywhere on the Site. Georgia-Pacific simply ignores the cash portion of the settlement. Because NCR is undertaking significant work valued at $135.7 million and providing more than $75 million in funding that can be used anywhere at the Site, NCR is receiving a Site-wide covenant. The scope of the "matters addressed" is consistent with the "cleanup which the settlors are performing or funding" as stated in the Memorandum. ECF No. 32-3 at PageID.541. Since NCR is paying its fair share, Site-wide contribution protection is warranted. *See* ECF No. 11 at PageID.286-94.

II. Georgia-Pacific's Proposed Language Regarding Special Account Money is Unnecessary, Unworkable, and Inconsistent With EPA Guidance

The Consent Decree does not need to be altered to address Intervenors' concerns about whether NCR's funding will be used at the Site. The additional language that Georgia-Pacific proposes is unnecessary, unworkable, and inconsistent with EPA Guidance.

A. Section 113(f)(2) Addresses Georgia-Pacific's Concerns that Funds Paid by NCR Will Be Used to Reduce Its Liability

CERCLA § 113(f)(2) dictates that the amount than NCR pays under this Consent Decree "reduces the potential liability of the others by the amount of the settlement." 42 U.S.C. § 9613(f)(2). As such, Georgia-Pacific's request to include a similar statement in the Decree is unnecessary. Similarly, the Intervenors' request to include assurances that the Special Account money will be used at the Site are duplicative of the protections provided by Section 113(f)(2). The plain language of the statute provides that the Intervenors are entitled to a reduction in their liability for the amount of the settlement with NCR. Even if EPA deposited the money paid by NCR into the Superfund (which it does not intend to do), the Intervenors would be entitled to a reduction in their liability for the amount of those funds. Therefore, the Intervenors' language to ensure that NCR's money is used at the Site is superfluous because the statute reduces their liability by the amount of the settlement.

B. The Funds in the Special Account Are Fungible and Additional Language is Not Needed to Ensure the Funds Are Used at the Site

Notwithstanding the protection provided by CERCLA § 113(f)(2), the Consent Decree contains model language that requires funds provided by NCR be deposited in a special account and used at the Site or transferred to the Superfund.[3] This model language has been used at countless sites throughout the country. The Intervenors offer no reason why this model language is insufficient to ensure that the funds will be used for Site-related costs. They identified no site where EPA transferred funds to the Superfund in lieu of using them at the site, despite the widespread use of this language. There is simply no justification for a departure from model language.

[3] The model is here: https://cfpub.epa.gov/compliance/models/view.cfm?model_ID=81

As stated in the opening brief, EPA's guidance provides a hierarchy that prioritizes spending funds for cleanup at the Site and leaves transferring money to the Superfund as the lowest priority. ECF No. 11-2. The Intervenors propose language for Paragraph 44 of the Decree, which would prevent the transfer of funds to the Superfund until all response actions at the Site have been completed. However, EPA Guidance states "[i]f a Region can reasonably estimate that a special account contains more funds than are needed to address remaining known and potential future CERCLA work at a site," the funds should be transferred to the Superfund. *Id.* at PageID.363. The Intervenors' language is inconsistent with that guidance.

Georgia-Pacific also requests various other assurances that the special account funds will be used at the Site. However, the language is unnecessary because, in addition to the protections of CERCLA § 113(f)(2), EPA's guidance establishes a hierarchy that emphasizes using funds at the Site and special account money is not easily transferred away from Site use. EPA established a Superfund Special Accounts Senior Management Committee ("SASMC") to be responsible for oversight of the Agency's management and use of special accounts. *See* Attachment A (Superfund Special Accounts Management Strategy) at 10. The SASMC implements and ensures national consistency of the EPA guidance. Regions are required to develop plans for the use of special account funds and are required to notify EPA Headquarters of the intent to transfer funds to the Superfund or to close out a special account. *Id.*

Georgia-Pacific raises concerns that EPA will not use the funds at the Site because EPA has not yet used certain funds recovered pursuant to a bankruptcy for response activities at the Site. Georgia-Pacific brazenly admits that it would not sign a settlement with the United States, thereby requiring EPA to issue a UAO, so that Georgia-Pacific could seek to "assert a more powerful claim under CERCLA section 107" against the other parties, rather than a CERCLA

section 113 claim. ECF No. 32 at PageID.480. Such concerns are unwarranted and EPA's retention of such funds to date results from Georgia-Pacific's own decision-making since EPA guidance provides that "[s]pecial account funds should not be disbursed to a PRP performing the response action pursuant to a [UAO]." ECF No. 11-2 (EPA Guidance) at PageID.362. This guidance implements EPA's policy preference for work to be performed under settlements. Indeed, it would be particularly inappropriate to provide special account funds to Georgia-Pacific under a UAO, when it explicitly refused to sign a settlement in an attempt to circumvent the contribution protection provisions of parties who settled.

Accordingly, the additional language sought by the Intevernors is not necessary as EPA's regular practices and guidance ensure that money collected will be used for Site costs.

C. Regular Disclosure of EPA's Accounting is Unnecessary and Burdensome

The United States has provided Georgia-Pacific information about its costs when asked, but it is arbitrary and burdensome to require annual reporting. Georgia-Pacific does not dispute that the accounting information is most important at the time of potential settlement discussions. In fact, it almost admits as much. *See* ECF No. 32 at PageID.500 (arguing disclosure puts it on "equal footing" during negotiations). However, Georgia-Pacific does not explain why the United States providing disclosure at that point, as opposed to annual disclosure, puts Georgia-Pacific at any disadvantage. This is particularly salient as it imposes an additional burden on EPA without any benefit.

III. The Court Does Not Need to Decide Whether Georgia-Pacific Has a Section 107 or Section 113 Claim Against NCR But, if it Does, Georgia-Pacific Only Has a Section 113 Claim

In its public comments, Georgia Pacific requested that the Decree be modified to affirmatively state that a non-settling party can bring a CERCLA Section 107 claim against

NCR. ECF No. 11-2 at PageID.327-8. Since Georgia-Pacific now argues the question is unripe, ECF No. 32 at PageID.501, this Court should consider the comment withdrawn, and should not address it.

However, if the Court were to consider the question, Georgia-Pacific cannot bring a Section 107 claim against NCR because it has been sued (or counterclaimed against) multiple times under Sections 106 and/or 107 by the United States and private parties, including most recently, by International Paper, which in 2018 filed a separate complaint under Section 107 (and 113) for all response costs incurred or to be incurred at the site, including costs under the UAO. Under Section 113(f)(1), "any person may seek contribution from any other person who is liable or potentially liable under section [107](a) of this title, during or following any civil action under section [106 or 107] . . . of this title or under section 9607(a) of this title." 42 U.S.C. 9613(f)(1). Under the law of this circuit, a party "must proceed under § 113(f) if they meet one of that section's statutory triggers." *Hobart Corp. v. Waste Mgmt. of Ohio, Inc.*, 758 F.3d 757, 767 (6th Cir. 2014), GP has met the statutory trigger, at a minimum, for a Section 113(f)(1) claim, and must use it, and not Section 107, to recover costs from other PRPs at the site.[4]

Further, in the contribution case, this Court entered "[a] declaratory judgment finding all four parties liable under 42 U.S.C. § 9607 for future response costs incurred by any party at the Site." *Georgia-Pac. v. NCR*, 1:11-cv-00483-RJJ, ECF No. 925 at PageID.34746. Any response costs incurred by a PRP that were not resolved by this Court's judgment fit within the definition of future response costs. Thus, this Court already declared all the parties, including Georgia-Pacific, liable for *all* future response costs at the Site incurred by it or any other party at the Site.

[4] Of course, GP also resolved its liability for response costs and actions in judicial and administrative settlements and pursuant to Section 113(f)(3)(B) has a (or an additional) contribution claim under that section for costs incurred under those agreements.

See Georgia-Pac. v. NCR, 1:11-cv-00483-RJJ, ECF No. 925 at PageID.34746. Georgia-Pacific simply ignores this Court's declaratory judgment and, in fact, wrongly implies that it has not been found liable.

All the cases cited by Georgia-Pacific involved circumstances where the court allowed a Section 107 claim precisely because the defendant had either not been found liable for those costs during a prior suit (thereby avoiding Section 113(f)(1)'s trigger) or had not resolved liability to the government for response costs or actions as required by Section 113(f)(3)(b)'s trigger). In *Whittaker Corp. v. United States*, the plaintiff could bring a Section 107 claim because it sought "reimbursement … for a *different set of expenses, for which [the plaintiff] was not found liable*" in a previous suit. 825 F.3d 1002, 1011 (9th Cir. 2016) (emphasis added). In *Bernstein v. Bankert*, the court permitted a Section 107 claim for costs incurred under an administrative agreement that the court found, under the specific terms of that agreement, did not "resolve[] liability," within the meaning of Section 113(f)(3)(B). 207, 210-214. 733 F.3d 190, 207, 210-214 (7th Cir. 2012). In *Agere Systems, Inc. v. Advance Env'l Tech. Corp.*, the court held that companies that settled with private PRPs, but that had not been sued by EPA or settled with EPA, and thus had no contribution action, could pursue a Section 107 claim. 602 F.3d 204, 212-13 & 225-26 (3d Cir. 2010).

Georgia-Pacific's reliance on *Am. Cyanamid Co. v. Capuano*, 381 F.3d 6, 13 (1st Cir. 2004) and *RSR Corp. v. Commercial Metals Co.*, 496 F.3d 552, 559 (6th Cir. 2007) is misplaced because those decisions concern when the statute of limitations runs, holding not surprisingly, that, consent decrees for partial site cleanup trigger the statute of limitations only for work required by those judgments.

As such, this Court need not decide whether the prior judgment included an explicit determination that the parties were limited to a § 113 claim or whether a UAO constitutes a civil action. The Parties must file a claim for future response costs as a § 113 claim because this Court's judgment finding them liable for future response costs triggers § 113(f)(1). It does not matter whether Georgia-Pacific incurs those costs under a UAO or a settlement agreement. The prior judgment clearly declares Georgia-Pacific liable for future response costs and Georgia-Pacific's implication that it has not been found liable for future response costs is baseless.

CONCLUSION

The proposed Consent Decree ensures a decade of work will proceed without the delays caused by litigation or the administration of a UAO. NCR is significantly contributing to the cleanup and restoration of the Site. Notwithstanding Georgia-Pacific's objections, this Court should enter the Consent Decree.

Respectfully submitted,

KAREN S. DWORKIN
Deputy Section Chief
Environmental Enforcement Section
Environment & Natural Resources Division
U.S. Department of Justice

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s/ *Kristin M. Furrie*
KRISTIN M. FURRIE
Senior Counsel
Environmental Enforcement Section
U.S. Department of Justice
P.O. Box 7611
Washington, DC 20044
(202) 616-6515
Kristin.Furrie@usdoj.gov

ANDREW BYERLY BIRGE
United States Attorney
Western District of Michigan

Adam B. Townshend
Assistant United States Attorney
Western District of Michigan
330 Ionia Ave. N.W., Suite 501
Grand Rapids, MI 49503

Of Counsel:
NICOLE WOOD-CHI
Associate Regional Counsel
U.S. Environmental Protection Agency - Region 5
77 W. Jackson Blvd. (C-14J)
Chicago, IL 60604